United States Court of Appeals

for the Second Circuit

SUPPLEMENTAL BRIEF

76-7426
77-7032

To be argued by: Jack P. Levin

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 76-7426
77-7032

RAYMOND G. LASKY, et al.,

Plaintiffs-Appellees,

-against-

SHERIFF LAWRENCE QUINLAN, et al.,

Defendant-Appellant.

On Appeal from Orders of the
United States District Court
for the Southern District of New York

SUPPLEMENTAL BRIEF OF PLAINTIFFS-APPELLEES

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PRELIMINARY STATEMENT

At the oral argument of these appeals held on June 8, 1977 the Court asked whether these appeals are moot. This issue was not previously raised. This supplemental brief is submitted by plaintiffs-appellees in support of their position that the Stipulation and Order of then District Judge Murray I. Gurfein in 1973 was unambiguously intended to benefit all inmates at the Dutchess County Jail (the "Jail"), both then and in the future. These appeals are from a judgment of civil contempt.

The underlying Stipulation and Order entered by the District Court upon the consent of the parties in 1973 was never appealed from and is not now before this Court for review. That Stipulation and Order was entered at a time when named plaintiffs were still being held at the jail under the conditions complained of. The action was therefore not moot when settled on the merits in 1973.

The claims of each named plaintiff were thus resolved in a settlement of the action providing for benefits to all inmates. Plaintiffs' counsel, acting as counsel to all the inmates pursuant to the intent of Judge Gurfein's 1973 Order, brought a contempt motion when it became clear that there was no prospect of voluntary compliance by the Sheriff with that settlement and when sufficient evidence to prove the contempt could be gathered.

Ever since the signing of the 1973 Stipulation and Order, there has been an active controversy between the inmates at the Jail and the Sheriff as to his compliance with an order issued for their benefit. That controversy continues to this day and is in no sense moot.

RELEVANT PROCEDURAL BACKGROUND

This action was commenced on April 16, 1973 by the filing of a pro se class action complaint by five inmates at the Jail (6a). At the conclusion of an evidentiary

hearing held in July 1973 plaintiffs' counsel moved orally for the certification of a class. Judge Gurfein reserved decision.

Judge Gurfein suggested that counsel attempt to agree on improvements in conditions at the Jail. Plaintiffs' counsel therefore drafted a stipulation requiring the Sheriff to make specific administrative and some physical changes to correct certain of those conditions (27a). The stipulation was signed by counsel for both sides and submitted to the District Court.

On July 30, 1973 the District Court issued an order approving the stipulation (80a). The action was dismissed upon the filing of the stipulation, "subject to reopening or the institution of contempt proceedings in the event of a wilful failure to comply with the aforementioned order of the Court." (82a). The Court recognized the continuing obligation of plaintiffs' counsel to monitor compliance with the 1973 Stipulation and Order for the benefit of their clients, the inmates:

> "No other order is required at this time, but assigned counsel may request a right of visitation at some time in the future. They may, in the meantime, communicate by mail with inmates as 'special correspondence' under the conditions provided in the order." (82a; 30a).

Judge Gurfein found "no need to declare this a class action, since I can find nothing substantial in a

constitutional sense that is likely to be added because of a class determination." (82a).

In the four years that this matter has been litigated, there has been a live controversy concerning conditions at the Jail, there have been inmates complaining of conditions there and this contempt proceeding has been vigorously prosecuted.

THIS CONTEMPT PROCEEDING IS PROPERLY BROUGHT ON BEHALF OF ALL CURRENT INMATES AT THE DUTCHESS COUNTY JAIL

Non-Parties have the Right to Seek Enforcement of an Order Intended to Benefit Them

Although Judge Gurfein declined to certify a class, he clearly intended that the Stipulation and Order be complied with. The possibility of a contempt proceeding as a remedy for noncompliance was specifically mentioned by the District Court (82a). A class determination was not necessary to the implementation of the Stipulation and Order.

Rule 71 of the Federal Rules of Civil Procedure provides as follows:

> "PROCESS IN BEHALF OF AND AGAINST PERSONS NOT PARTIES
>
> When an order is made in favor of a person who is not a party to the action,

> he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party."

Professor Moore notes that Rule 71 is intended to make

> "all orders fully enforceable in favor of and against all persons who are properly affected thereby even though not parties to the action. . . .
>
> "The type of process that may be utilized be it a writ of execution, assistance, attachment, sequestration, contempt, or other court process, will depend, naturally, upon the circumstances in each case." (Emphasis added). 7 J.W. Moore, Federal Practice, ¶ 71.02 (1975).

Thus, in Spangler v. Pasadena City Board of Education, 537 F.2d 1031, 1032 (9th Cir. 1976), a child's father, who was not a party to the original proceeding had standing to bring on a contempt motion for noncompliance with a school desegregation plan which affected a school in which his child was enrolled.* See also, Wood v. O'Brien, 78 F. Supp. 221 (D. Mass. 1948) (Tenant permitted to enforce by contempt an injunction obtained by the government against that tenant's landlord requiring the landlord

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* Judge Wallace dissented on the grounds that the child and not the parent was the proper party to enforce the action pursuant to Rule 71, as the desegregation plan was for the benefit of children in the school system. Here of course the inmates are the very persons whom the order is intended to benefit.

to maintain certain essential services); United States v. Hackett, 123 F. Supp. 104 (W.D. Mo. 1954) (tenants permitted to execute on judgment for excessive rents obtained on their behalf).

There can be no clearer case than this for the application of Rule 71. The Sheriff was held in contempt of an order which was clearly intended to benefit the inmates at the Dutchess County Jail. Long after that order was issued, plaintiffs' counsel continued to seek implementation of that order on behalf of those whom he properly took to be his clients, namely, the everchanging group of inmates at the Jail who were continuously subjected to effects of the Sheriff's noncompliance with the 1973 Stipulation and Order. The correspondence file of plaintiffs' counsel is thick with letters of complaint from such inmates well past the time when the contempt motion was brought. Here, as this Court observed in Zurak v. Regan, 550 F.2d 86, 92 (2d Cir. 1977), discussed infra, "the court may safely assume that counsel has other clients with a continuing live interest in the issues . . . ."

New Named Plaintiffs were not Necessary for the Prosecution of This Contempt Motion

In cases such as this where there are continuing grievances of an everchanging group of inmates, courts have looked to the substance of controversy rather than to the caption of the case. In Zurak v. Regan, 550 F.2d 86 (2d Cir.

1977), inmates at Rikers Island complained that procedures were inadequate to insure that their applications for conditional release were properly processed. The District Court issued an injunction requiring the defendants, the New York State Board of Parole and state correctional officials to institute such procedures. On appeal, this Court treated a preliminary issue regarding jurisdiction. The Court ruled that while a litigant must ordinarily be a member of the class that he seeks to represent at the time the class is certified,

> "the constant existence of a class of persons suffering the alleged deprivation is certain and the court may safely assume that counsel has other clients with a continuing live interest in the issues (appellees are represented by the Parole Revocation Defense Unit of the Legal Aid Society). See Gerstein v. Pugh, supra, 420 U.S. at 110-11 n. 11, 95 S.Ct. 854; Frost v. Weingerger, 515 F.2d 57, 62-65 (2d Cir. 1975); McGill v. Parsons, 532 F.2d 484, 488-89 (5th Cir. 1976); Inmates of San Diego County Jail in Cell Block 3B v. Duffy, 528 F.2d 954, 956-57 (9th Cir. 1975). . . ." 550 F.2d at 92.

After noting that a class in Zurak had been certified, this Court found that the case was not moot:

> "Because of the relatively short periods of incarceration involved and the possibility of conditional release, the alleged harm can hardly be redressed while any possible plaintiff is still an inmate. See Gerstein v. Pugh, supra, 420 U.S. at 110 n. 11, 95 S.Ct. 854; Sosna v. Iowa, supra, 419 U.S. at 401-402, 95 S.Ct. 533 . . . Furthermore, it is clear that there is a sufficient adversary relationship here to assure proper presentation of the issues. Franks v. Bowman Transportation Co., 424 U.S. 747, 752-57, 96 S. Ct. 1251, 47 L.Ed.2d 444 (1976).

The difference between Zurak and this case is that Zurak determined that an action could still be determined on the merits even though no named plaintiff was a member of the class when the class was certified. Here, where the merits of this action were determined by consent in 1973, the question is whether inmates other than the named plaintiffs can enforce the 1973 Stipulation and Order by resort to a contempt proceeding. The inmates of the Dutchess County Jail had a judgment in their favor which was being ignored by the Sheriff. They properly sought to gain the benefit of that judgment by bringing a contempt motion. Inmates testified at the contempt hearing, and many more were prepared to do so.

The Fifth Circuit has also looked to substance over form in such cases. In Cruz v. Hauck, 515 F.2d 322 (5th Cir. 1975), inmates in a county jail challenged the constitutionality of restrictions on their access to legal materials. The Court noted preliminarily as to the named plaintiff that

> "Cruz has been discharged and the record seems to indicate that the other individual plaintiffs are no longer confined in the Bexar County Jail. We have been unable to find any certification of this proceeding as a class action. The parties, however, have treated the litigation as though the District Court made an appropriate certification. The defendants have not raised the issue of mootness and since the legal issues presented continue to affect the prisoners in the jail, contrary to the situation in Board of School Commissioners v. Jacobs, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74

(1975), a case or controversy exists with respect to the validity of the rules at issue." 515 F.2d at 325 n. 1.

This action has proceeded similarly and should be similarly treated.

CONCLUSION

On October 16, 1976 plaintiffs filed a motion for further contempt sanctions seeking an order adjudging the Sheriff to be in contempt of the 1973 Stipulation and Order as well as the 1976 contempt judgment. Plaintiffs asked the District Court to impose daily fines to incarcerate the Sheriff until he complied and to appoint a receiver to assume administrative control of the Dutchess County Jail.

On November 11, 1976 a conference was held in chambers at which it was agreed by all counsel and the District Court -- in the Sheriff's presence and with his consent -- that the Sheriff would yield all de facto control over the Jail to a warden-administrator. That agreement was formalized in an order entered by the District Court on December 26, 1976 appointing a warden-administrator and setting forth his duties. On the strength of that agreement the District Court approved the withdrawal of the motion for further contempt sanctions.

There has been considerable conflict between the warden-administrator and the Sheriff. As this supple-

mental brief is filed, the District Court is holding a further chambers conference for the purpose of hearing these matters. Plaintiffs-appellees respectfully suggest that the contempt judgment and the securing of full benefits to the inmates under the 1973 Stipulation and Order are still very live issues before the District Court.

This Court should affirm the opinions and orders of the District Court so that the inmates of the Dutchess County Jail can at last realize the benefits promised to them on paper in 1973.

Dated: New York, New York
June 15, 1977

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOYCE YARDE, being duly sworn, deposes and says that she is over the age of 18 years; that on the 15th day of June, 1977 she served the annexed Brief of Plaintiffs-Appellees on

Peter R. Kehoe, Esq.
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by depositing two true copies of the same securely enclosed in a postpaid wrapper in a Post Office Box regularly maintained by the United States Postal Service at No. 1 Chase Manhattan Plaza in the City and County of New York, directed to said attorney at the address set out under his name; this being the address designated by him for this purpose

upon the preceding papers on these appeals.

Joyce Yardi

Sworn to before me this

15th day of June, 1977

Jon Yard Arnason

JON YARD ARNASON
Notary Public, State of New York
No. 31-4610458
Qualified in New York County
Commission Expires March 30, 1979